Rule 408. Compromise Offers and Negotiations.

(a) **Prohibited Uses.** Evidence of the following is not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

(1) furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or a statement made during compromise negotiations about the claim.

(b) **Exceptions.** The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Comment to 2012 Amendment

The 2012 amendment does not include any substantive changes and does not include the "criminal use exception" in Federal Rule of Evidence 408(a)(2).

Otherwise, the language of Rule 408 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 408 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the rule. To improve the language of the rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

The reference to "liability" has been deleted on the ground that the deletion makes the rule flow better and easier to read, and because "liability" is covered by the broader term "validity." Courts have not made substantive decisions on the basis of any distinction between validity and liability. No change in current practice or in the coverage of the rule is intended.

Cases

408.010 Although evidence of an offer to compromise is not admissible to show liability, such evidence is admissible if relevant to some other issue in the litigation.

Hernandez v. State, 203 Ariz. 196, 52 P.3d 765, ¶¶ 8–9 (2002) (court assumed for purpose of discussion, that notice of claim letter required by statute constitutes offer to compromise, and held that party could use statements contained in other party's claim letter to impeach other party's trial testimony).

Henry v. Healthpartners of Southern Arizona, 203 Ariz. 393, 55 P.3d 87, ¶¶ 14–15 (Ct. App. 2002) (medical malpractice action resulting from patient's death from cancer was filed against decedent's doctor, radiologist employed by medical center, and medical center (TMC/HSA); plaintiff settled with doctors and went to trial against TMC/HSA; TMC/HSA named doctors as non-parties at fault; plaintiff's trial strategy was to minimize radiologist's fault in order to place more of blame on TMC/HSA; court held plaintiff's factual allegations contained in

complaint delineating radiologist's negligence were not made in compromise of disputed claim, thus they did fall under definition in Rule 408, and even if they did, they showed why radiologist was not present at trial and refuted plaintiff's trial strategy to minimize radiologist's fault, thus they were not subject to exclusion under Rule 408).

Giles v. Hill Lewis Marce, 195 Ariz. 358, 988 P.2d 143, ¶ 13 (Ct. App. 1999) (evidence of parties settlement admissible on issue of malicious prosecution).

Gutierrez v. Gutierrez, 193 Ariz. 343, 972 P.2d 676, ¶ 34 (Ct. App. 1998) (because trial court must consider possibility of settlement in determining attorney's fees under A.R.S. § 12–341.01(A), and must consider reasonableness of party's position in determining attorney's fees under A.R.S. § 25–324, trial court may consider settlement offers).

Monthofer Inv. v. Allen, 189 Ariz. 422, 943 P.2d 782 (Ct. App. 1997) (parties agreed to stipulated judgment; in exchange for plaintiff's agreement not to execute on judgment, defendant agreed to pursue third-party claim and assign to plaintiff any amounts collected to extent necessary to satisfy judgment; court held evidence of settlement agreement and details was admissible to show potential bias of witnesses and to question whether defendant mitigated damages).

408.015 If evidence of an offer to compromise is offered to show liability and for no other permissible purpose, such evidence is not admissible.

Miller v. Kelly (Barrera), 212 Ariz. 283, 130 P.3d 982, ¶¶ 12–14 (Ct. App. 2006) (in wrongful death action based on medical malpractice, trial court granted plaintiff's motion to have defendant doctor disclose amounts paid in settlement of previous medical malpractice actions brought against him; court concluded that plaintiff's purpose in seeking this evidence was to prove defendant's negligence, and thus held trial court erred in ordering disclosure of settlement amounts).

S. Dev. Co. v. Pima Capital Mgmt Co., 201 Ariz. 10, 31 P.3d 123, ¶¶ 36–39 (Ct. App. 2001) (plaintiff bought apartment building from defendant, and later discovered apartment had been built with polybutylene pipe, which was defective; plaintiff sued defendant in tort for fraud; defendant contended evidence of its offer to rescind contract was admissible on issue of plaintiff's duty to mitigate damages; court held that, because plaintiff brought tort action, plaintiff did not have duty to mitigate damages, thus evidence of offer to rescind contract was not admissible).

State ex rel. Miller v. Superior Ct. (Stephens), 189 Ariz. 228, 941 P.2d 240 (Ct. App. 1997) (property owner sought to admit AzDOT appraisal report as admission against interest; purpose of report was to negotiate stipulation so AzDOT could take immediate possession of property without court intervention; court held this rule precluded admission of report, and A.R.S. § 12–1116(J) also precluded admission).

408.017 This rule prohibiting evidence of an offer to compromise offered to show liability applies not just to offers to compromise the present litigation, but also to evidence of offers to compromise made in other lawsuits.

Miller v. Kelly (Barrera), 212 Ariz. 283, 130 P.3d 982, ¶¶ 12–14 (Ct. App. 2006) (in wrongful death action based on medical malpractice, court held trial court erred in granting plaintiff's motion to have defendant doctor disclose amounts paid in settlement of previous medical malpractice actions brought against him).

408.030 At the time a party serves a notice of claim letter to the state, there is no disputed claim; because there is no disputed claim, the notice of claim letter cannot operate as an offer to compromise, thus this rule does apply to or preclude admission of a notice of claim letter to the state.

Hernandez v. State, 201 Ariz. 336, 35 P.3d 97, ¶¶ 10–16 (Ct. App. 2001) (plaintiff fell off wall at Patagonia Lake Park; because plaintiff testified there was no trail and that he stepped off retaining wall, notice of claim letter to state from plaintiff's attorney stating plaintiff was walking on trail and stepped off cliff was admissible as prior inconsistent statement), *vacated*, 203 Ariz. 196, 52 P.3d 765 (2002).